

Before the
Federal Communications Commission
Washington D.C. 20554

In the Matter of)
)
Telecommunications Relay Services)
And Speech-to-Speech Services for) CC Docket No. 98-67
Individuals with Hearing and Speech)
Disabilities)

Petition for Reconsideration

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SUMMARY

CSD requests that the Commission reconsider and revise three of the rulings contained in its June 2004 Report and Order on telecommunications relay services (TRS). First, CSD requests that the Commission permit reimbursement from the Interstate TRS Fund for video relay services that take place between individuals who use American Sign Language (ASL) and individuals who speak Spanish. Because ASL is the visual language used by most deaf individuals in America, and Spanish is the second most commonly spoken and written language in America, functional equivalency demands that deaf Americans be able to use VRS to converse by telephone with hearing Americans who speak Spanish.

Second, CSD seeks reversal of the Commission's decision to postpone the expiration of the answer speed waiver for VRS providers until January 1, 2006. The Commission fails to articulate a rationale for its decision to extend this waiver because there is *no* rationale that can support it. In fact, developments in VRS technologies and experience in handling VRS calls over the past two years have eliminated the uncertainties that initially justified the need for a waiver of the speed of answer minimum standard. Because there are no technical obstacles to reinstating the answer speed minimum standard for VRS and because fulfillment of this standard is needed to achieve functional equivalency, CSD urges the Commission to terminate this waiver as of January 1, 2005, and to provide adequate compensation to enable VRS providers to fulfill this relay mandate.

Third, given the Commission's decision to terminate the VRS waiver for emergency call handling as of January 1, 2006, CSD requests that the FCC immediately

permit reimbursement for the costs of researching and developing solutions to handle emergency VRS calls. Without compensation for these expenses, CSD and other VRS providers will be unfairly forced to shoulder the burden of finding an emergency access solution within an extremely limited time period.

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**COMMUNICATION SERVICE FOR THE DEAF
PETITION FOR RECONSIDERATION**

I. Introduction

Pursuant to Section 1.429 of the Commission’s rules,¹ Communication Service for the Deaf, Inc. (CSD) hereby petitions for reconsideration of various portions of the Report and Order adopted by the Federal Communications Commission (FCC or Commission) on June 10, 2004.² Specifically, CSD asks the Commission to overturn its decisions (1) not to authorize compensation from the Interstate TRS Fund for non-shared language translation to the extent that such translation is intended to handle video relay conversations between users of American Sign Language (ASL) and individuals who speak Spanish; (2) not to eliminate the waiver for video relay service (VRS) answer speed prior to January 1, 2006; (3) not to allow recovery for costs associated with research and development needed to meet the January 2006 requirement for emergency VRS call handling. CSD maintains that all of the above decisions violate the FCC’s obligation to ensure functionally equivalent relay services.

¹ 47 C.F.R. §1.429.

² *In the Matter of Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities, Report and Order, Order on Reconsideration, And Further Notice of Proposed Rulemaking*, CC Dkt 90-571, CC Dkt 98-67, CG Dkt 03-123, FCC 04-137 (June 10, 2004) (“June 2004 Report and Order”).

As a subcontractor to Sprint, CSD has been a non-profit VRS provider throughout all fifty states and the United States territories since 2000. During this period, CSD has watched as VRS has grown from an optional or “extra” service occasionally used by relay users, to a principal source of daily telecommunications access for whole communities of deaf and hard of hearing persons. CSD is also an organization run by and for deaf consumers that provides programs and services intended to increase communication, independence, productivity, and self-sufficiency for all individuals who are deaf and hard of hearing. Originally established in 1975 as part of the South Dakota Association of the Deaf, CSD now provides direct assistance to individuals through education, counseling, training, communication assistance, and telecommunications relay services.

II. The Commission Should Reverse Its Ruling on Non-shared Language Translation to the Extent that it Prohibits Reimbursement for ASL-to-Spanish VRS.

In its June 2004 Report and Order, the FCC decided not to authorize reimbursement for non-shared language relay translation from the Interstate TRS Fund.³ CSD seeks reconsideration of this decision to the extent that it disallows reimbursement for VRS that takes place between deaf or hard of hearing Americans who use American Sign Language (ASL) and Americans who speak Spanish. ASL-to-Spanish VRS is no different than ASL-to-English VRS – both require American individuals with a hearing loss who use a visual language to communicate with American hearing individuals who use a spoken language. As shown below, the enormous size of America’s Spanish speaking population means that the provision of VRS between ASL and Spanish speaking users is needed to achieve functionally equivalent relay service. Allowing

³ June 2004 Report and Order at ¶60.

reimbursement for this VRS feature will enable millions of deaf Americans who use ASL as their primary language to communicate by phone in the manner that best meets their communication needs with millions of Spanish speaking Americans – a result clearly dictated by the Americans with Disabilities Act (ADA).

A. Authorizing Video Relay Services Between ASL and Spanish Speaking Users is in Keeping with Prior Commission Practices to Respond to the Growing Size of the Latino Population in America

For well over a decade, the growth of the Spanish speaking population in America has been extraordinary, and all indications are that the pace of this growth will continue. According to the National Council for La Raza, the Latino population has been growing at a rate that far exceeds the overall national growth rate. Between 1990 and 2000, this group of Americans grew at a rate of 57.9%, compared with a nationwide growth rate of 13.2%.⁴ In 2002, the U.S. Census Bureau reported that there were approximately 38.8 million Latinos living in the U.S. By 2025, it is projected that this number will jump to approximately 61 million people, constituting nearly one in every five people, or 18.2% of the American population.⁵ In direct response to the intensifying growth of this population, an abundance of information has been developed and disseminated through television and radio programming, publications, advertisements, and educational materials that are now in Spanish.

The Commission itself has acknowledged and responded to the fact that the Latino community is the largest minority in our nation. This is particularly apparent in the FCC's disability rules. For example, the FCC has already required Spanish-to-Spanish interstate relay services, singling out this language only because "[t]he number

⁴ About the Latino Community – 20 Questions, www.nclr.org/content/faqs/detail/396/ (retrieved September 9, 2004).

⁵ *Id.*

of Spanish speaking persons is significantly larger than any other non-English speaking population and is rapidly growing.”⁶ It is noteworthy that at the time that the Commission decided that a Spanish relay mandate was warranted, it declined to make a ruling on whether other types of non-English TRS should be required.

In addition, the FCC’s closed captioning rules contain specific requirements for Spanish language television programming. The initial draft of the FCC’s captioning rules had exempted *all* non-English language programming; as is the case with relay services, the rules had grouped together all non-English languages.⁷ A petition for reconsideration filed by the National Association of the Deaf and the Consumer Action Network successfully challenged this approach.⁸ On reconsideration, the FCC generally affirmed its decision not to require non-English language programming, but decided to narrow this exemption by distinguishing Spanish language programming from all other foreign language programming. Again, it explained its decision to extend its disability obligations to only Spanish video programming providers because “the number of Spanish speaking persons is significantly larger than any other non-English speaking population and is rapidly growing.”⁹ The FCC noted that an additional reason to require Spanish language captioning was that the FCC’s captioning rules applied to programming

⁶ *In the Matter of Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, Report and Order and Further Notice of Proposed Rulemaking, CC Dkt 98-67, FCC 00-56 (2000) (First Improved TRS Order) at ¶30.

⁷ *In the Matter of Closed Captioning and Video Description, Implementation of Section 305 of the Telecommunications Act of 1996, Video Programming Accessibility*, Report and Order, MM Dkt No. 95-176, FCC 97-279, (1997) at ¶¶146-7.

⁸ The Consumer Action Network, later renamed the Deaf and Hard of Hearing Consumer Action Network, is a broad based consumer coalition of deaf and hard of hearing organizations.

⁹ *In the Matter of Closed Captioning and Video Description, Implementation of Section 305 of the Telecommunications Act of 1996, Video Programming Accessibility*, Order on Reconsideration, MM Dkt. 95-176, FCC No 98-236 (1998) at ¶95. The FCC supported its conclusion with statistics released by the Bureau of the Census. Bureau of the Census, Current Population Reports: Population Projections of the United States by Age, Sex, Race and Hispanic Origin: 1995-2050 (February 1996). Then, as now, Spanish was reported to be the most widely spoken non-English language in America. *Id.* at ¶95 n.312.

in Puerto Rico.¹⁰ It is important to note that Puerto Rico is also governed by exactly the same TRS rules that apply to the fifty states.

In addition to the above, the FCC's website contains a home page for information about its rules and regulations in Spanish.¹¹ A Spanish language directory of information takes readers to Spanish language links on a plethora of communication issues governing our nation's telephone, television, radio, cable and satellite policies.¹² In first launching this site, Dane Snowden, Chief of the FCC's Consumer and Governmental Information Bureau explained, "with many millions of Spanish-speaking consumers in our country, it is important to make it convenient for them to educate themselves about the choices they will be making concerning telecom products and services."¹³

The FCC's past actions to make its services and information accessible to members of the Latino community are not only admirable; they have been essential to reach out to this significant segment of the American public. It is similarly critical to facilitate communication between deaf people and these millions of Spanish-speaking individuals.¹⁴

¹⁰ *Id.* at ¶95 n.312.

¹¹ www.fcc.gov/cgb/consumerfacts/spanish/spanish.html (retrieved September 9, 2004.)

¹² www.fcc.gov/cgb/Spanishlinks.html (retrieved September 9, 2004.)

¹³ FCC News Release, FCC Consumer Information Bureau Launches "Bienvenidos," A Spanish-Language Homepage, (September 21, 2001). In addition, just recently, the FCC's Wireless Telecommunications Bureau released a new Spanish language video on wireless local number portability. In so doing, Chairman Powell explained, "[t]his sort of outreach to the Hispanic community is one of the more important things we can do to ensure that all consumers enjoy the full benefits of this vibrant wireless marketplace." FCC News Release, "FCC Video on Wireless Local Number Portability Reaches out to Hispanic Community" (September 9, 2004).

¹⁴ Some have questioned whether, if the FCC allows cost recovery for Spanish-to-ASL VRS, it must also allow reimbursement for every other non-shared language used in America. See e.g., Comments of Missouri PSC (filed September 23, 2003). While this might be appropriate where demand for such other non-shared language services existed and where the cost of providing those services was comparable to ASL-to-English VRS, the FCC would be well within its authority to limit interstate reimbursement to VRS between ASL and Spanish speaking individuals for the present time. Although this would entail some line drawing, this would not be new to the FCC, as shown by the above examples of rules and practices that have been specifically designed to adapt to the growing Latino population.

B. The Commission’s Justification for Disallowing ASL-to-Spanish VRS Cannot Withstand Scrutiny.

In its June 2004 Report and Order, the Commission concludes that the provision of non-shared language relay services “exceeds the functional equivalency mandate.”¹⁵ With very little explanation, the Commission goes on to state that this service is “a translation service, which is a ‘value-added’ service for hearing parties.”¹⁶ There are various problems with this conclusion.

First, although the Commission bases its refusal to fund ASL-to-Spanish VRS on the premise that this is a value added translation service, it readily acknowledges that it has already authorized at least one translation relay service – relay service between individuals who speak English and those who use ASL – in order to achieve functional equivalency.¹⁷ The Commission understands that ASL is not English, and that in order for two people to communicate with each other using each of these languages, there needs to be translation between the two. In fact, because ASL has its own grammatical structure and syntax, nearly *every* VRS call in America entails a *translation* between two languages – a spoken language (currently only English) and a visual language (ASL).¹⁸ It is for this very reason that VRS was first created – it was seen as a means of enabling ASL users who were not sufficiently acquainted with the English language to be able to communicate with hearing people who did not know ASL. Along these same lines, it is important to note that ASL has been formally recognized as a “foreign language” across

¹⁵ June 2004 Report and Order at ¶60.

¹⁶ *Id.*

¹⁷ June 2004 Report and Order at ¶56, citing to the First Improved TRS Order at ¶44-46.

¹⁸ ASL is only one of hundreds of signed languages around the world, each of which have their own distinct and complex grammatical structures. Although some VRS calls may occur between deaf people that use Signed English, a form of sign language that parallels English more directly, the overwhelming majority of VRS users utilize ASL at the present time.

the nation by states and universities that regularly offer students foreign language credit for taking ASL courses.¹⁹

Allowing reimbursement for English-to-ASL translation makes sense. Because English is the principal language spoken in America, as noted above, there would be no, or very little use of VRS were this translation not allowed. But if, as all sources agree, Spanish is the next the most widely spoken language in the United States, it makes little sense to deny reimbursement for relay translation between ASL and Spanish speaking people as well, especially when the cost of providing ASL-to-Spanish VRS is not expected to be any different than the cost of providing ASL-to-English VRS.²⁰ Rather than being a value added service, Spanish-to-ASL VRS is simply a functionally equivalent service that can enable deaf and hard of hearing ASL users to converse with Spanish speaking people who can hear.

The second problem with the Commission's rationale for denying reimbursement for non-shared language translation is that it mischaracterizes the factual issue at hand by inappropriately focusing on the benefit that these services provide to hearing, rather than deaf relay users. Although the FCC acknowledges that "the provision of non-shared language relay service may satisfy a specific need for *persons with hearing or speech disabilities*,"²¹ it nevertheless concludes that this service goes beyond the functional

¹⁹ Goddard, Tracy, White Paper on ASL-Spanish VRS. Sprint Corporation at 4-9.

²⁰ In its comments on the FCC's June 2003 Notice of Proposed Rulemaking, CSD noted its willingness to provide ASL-to-Spanish relay services within thirty days after a mandate began, "so long as the VRS rate takes the costs of providing these services into account." CSD Comments at 6 n.6 (September 24, 2003). CSD wishes to clarify that while the present request for reconsideration seeks compensation for ASL-to-Spanish VRS, we do not expect the rate for these non-shared language calls to be any greater than that for ASL-to-English translation.

²¹ June Order at ¶60 (emphasis added); See also *In the Matter of Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, Report and Order and Further Notice of Proposed Rulemaking, CC Docket No. 98-67, CG Docket No. 03-123, FCC 03-112 (rel.

equivalency mandate because it is a “‘value added’ service for *hearing parties*.” But the central issue in this proceeding should be whether ASL-to-Spanish will bring relay services closer to meeting the ADA’s goal of achieving the full integration of *deaf and hard of hearing* people into American society, not, as portrayed by the Commission, whether a *hearing* person who speaks Spanish can benefit by communicating with people who do not speak Spanish via relay. By focusing on the hearing individual, the Commission obscures the real issue and ignores the ultimate goal of the ADA’s relay mandates, *i.e.*, the societal integration of people who are deaf and hard of hearing.

Upon introduction of the ADA, Senator Harkin emphasized the ways that a relay system could empower people who were deaf, hard of hearing, and speech disabled “to have greater control over their own lives.” Lack of telephone access, he explained, would continue to relegate these persons to “second-class citizenship.”²² Similarly, upon Senate passage of the ADA, Senator McCain predicted that “Title IV of the ADA will move us closer than ever toward granting the hearing and speech impaired the independence and greater opportunities sought in the other sections of the Americans with Disabilities Act. . . .”²³ Precisely because Spanish speaking Latino Americans make up so large a portion of the American population, the FCC should be taking actions to enhance, not reduce communication between deaf people and Americans who speak Spanish. Denying people who are deaf and hard of hearing the right to use VRS to communicate with the overwhelming number of individuals who speak Spanish violates

June 17, 2003) (Second Improved TRS Order) at ¶114 (multi-lingual translation services might “meet the unique needs of certain identifiable TRS users”).

²² News Release, Tom Harkin of Iowa, “Opening Statement of Senator Tom Harkin, Subcommittee on the Handicapped, Hearing on the Americans with Disabilities Act of 1989 (May 10, 1989).

²³ 136 Cong Rec. No. 89 (daily ed. July 13, 1990).

these ADA goals to improve the independence, productivity, and integration of relay users.²⁴

For a brief set of months during 2002 and 2003, CSD had been providing ASL-to-Spanish VRS.²⁵ After being told that this service was not eligible for TRS reimbursement, CSD halted these operations and reimbursed the Interstate TRS Fund for previous billings. What occurred after that demonstrated to CSD the vital need for this service. During the months that followed the cessation of these services, complaints about the discontinuation of these services skyrocketed.²⁶ Deaf people who had finally been able to converse by telephone with hearing people who use the second most prevalent spoken language in the nation discovered that they were again being denied that right. They could not understand why their communication had been taken away from them and pleaded with CSD to restore this service. All that CSD could do was inform them that this service was no longer reimbursable, and that CSD could not afford to provide it on its own.

C. Authorizing ASL-to-Spanish VRS is Especially Critical for Deaf Latino Children

In addition to acknowledging the general growth of the Latino population, the FCC has acknowledged that Latinos are the “fastest growing minority group” among deaf

²⁴ Although a certain number of individuals in the ever growing Latino American community do speak some English, for the overwhelming majority, English is not their native language. It has been CSD’s experience that relaying English language conversations between non-native English speakers can take four to five times as long as relaying conversations between native speakers. Thus, denying compensation for ASL-to-VRS conversations – which can be accomplished swiftly the first time around – can also end up imposing greater costs on the Interstate TRS Fund.

²⁵ From October, 2002 to April of 2003, CSD handled an average of 1000 ASL-to-Spanish VRS calls on a monthly basis. Based on this experience, CSD predicts that in the future, these calls will constitute no more than one to two percent of all VRS calls.

²⁶ During this period, a full third of all complaints/concerns on VRS brought to CSD’s attention concerned the cessation of these services.

school aged children living in the United States.²⁷ Gallaudet University reports that as many as 24.5% of all deaf and hard of hearing students ages three and up are Latino.²⁸ The FCC has further recognized that “ASL becomes the first language for many of these Hispanic youths because it is the first language that is fully accessible to them, even though ASL is not the primary language used in their home.”²⁹ In this regard, we have already pointed out to the Commission that a considerable number of Latino children who are deaf are educated in ASL and English. Because they do not learn Spanish in the deaf residential and day schools they attend, the only way for these children to communicate with their relatives by telephone – especially because many are young and cannot yet type – is through non shared-language VRS.

It is important to point out that the gap in communication that occurs here is precisely *because* these children are deaf. Arguments that Spanish-to-VRS is a value added service for these children are inapposite because without VRS, there *is no* way for these children to communicate with their Latino communities.³⁰ Hearing Latino children are able to easily able to communicate by phone in Spanish – not only because they learn

²⁷ June 2004 Report and Order at ¶57 n. 197, citing Schildroth & Hotto, “Changes In Student and Program Characteristics,” American Annals Of The Deaf, 141(2), 68-71 (1996), published in Hispanic Outlook in Higher Education, May 2000, Jean F. Andrews, Ph.D. & Donald L. Jordan, Ph.D. Lamar University, Beaumont, TX.

²⁸ 2002-03 Regional and National Survey, Gallaudet Research Institute, as reported at http://gri.gallaudet.edu/Demographics/2003_National_Summary.pdf. This works out to approximately 9695 students. As with the general Latino population, this number has grown significantly in recent years. Latino Americans made up only 9.4% of the total deaf and hard of hearing school population during the 1978-79 school year. In 2001-02, this percentage grew to 22.8% and is obviously still growing.

²⁹ June 2004 Report and Order at 57 n. 198, citing Schildroth & Hotto, “Changes in Student and Program Characteristics,” American Annals of the Deaf, 141(2), 68-71 (1996).

³⁰ Even if a deaf child *did* learn the Spanish language and *was* able to type, it is important to clarify that he or she would still be denied the ability to communicate in a functionally equivalent manner without VRS. Text relay, which the child would have to use, cannot begin to offer the level of functional equivalency that VRS can offer. With VRS, these deaf children can speak in the language with which they are most familiar (ASL), convey and receive the full emotional content of the conversation, and converse in real-time without unnatural pauses and delays. Again, however, young children cannot type, and so for them, text relay is not even an option.

Spanish but also because they can hear and speak over the phone. By contrast, deaf children have two disadvantages when communicating over the telephone – first, they cannot communicate in Spanish because the deaf schools they have gone to have not taught them Spanish, and second, they cannot communicate orally because they are deaf. Without VRS access, they are left with virtually no way to communicate over the telephone with their Spanish speaking families and friends.

D. The Commission’s Reliance on the Comments of Various Public Service Commissions and Companies is Misplaced.

In support of its decision not to recognize non-shared language relay service as a reimbursable TRS service, the Commission refers to “[s]everal LECs and state utility commissions [who] oppose a requirement that non-shared language TRS, whether traditional TRS or VRS, be reimbursed.”³¹ But a careful look at many of the comments cited by the Commission raises questions about the extent to which the parties who prepared those comments truly oppose reimbursement for this relay feature, especially if it is limited to Spanish-to-ASL translation. For example, the comments submitted by the California PUC, listed by the FCC as one of the state commissions opposing interstate cost recovery for non-shared language relay service, merely reveals opposition to *mandating*, not *authorizing* this service. In fact, the PUC made clear that “[a]s long as non-shared language calls are also relay calls that meet the Commission’s minimum standards, *reimbursement from the Interstate TRS fund is appropriate for interstate calls.*

.. ”³²

³¹ June 2004 Report and Order at ¶59.

³² California PUC Comments at 7 (September 24, 2003) (emphasis added). That the California PUC supports interstate reimbursement for Spanish-to-ASL translation services was recently confirmed by Linda Gustafson of the California PUC at the September 8, 2004 meeting of the National Carriers Exchange Association.

Similarly, although comments submitted by the Missouri Public Service Commission (PSC) question the appropriateness of defining non-shared language translation as a relay service, the Missouri PSC's concern seems to focus mostly on the scope of an FCC ruling on this issue. Specifically, the PSC notes that the FCC has not been "clear as to whether the request is limited to Spanish-to-English conversations or multi-lingual relay service,"³³ and asks whether the Commission wants to "allow reimbursement, not just for Spanish, but also Swedish, French, Swahili, German, Dutch, etc."³⁴ Since Missouri already provides Spanish language relay services for its residents, hopefully the state was more concerned with opening the floodgates of multi-language services than it was with allowing interstate reimbursement for services that would facilitate communication with our nation's largest minority.

SBC's comments, also cited by the Commission, confuse the issue entirely, in that they state opposition to recovering the costs of "non-English language relay services" from the Interstate fund. SBC tries to defend its position by noting that "non-English language relay service are not eligible for recovery from the Interstate TRS Fund."³⁵ But in fact, non-English language relay service – namely Spanish-to-Spanish relay service – *is* already both required and authorized for payment from the Interstate Fund under the FCC's rules, and is not even at issue in the instant proceeding.

Finally, the Iowa Utility Board (Iowa UB), yet another commenter cited by the FCC, suggests that non-shared language translation is a "translation service between parties that speak different languages and is not functionally equivalent," because it is

³³ Missouri PSC Comments at 3.

³⁴ *Id.* The PSC goes on to query whether future FCC rulings could be construed to force relay providers to request bids for "Klingon translators, as Multnomah County, Oregon, recently did."

³⁵ SBC Reply Comments at 4 (October 9, 2003).

like translation services used by hearing people. Specifically, the Iowa UB states, “[i]f a person *who does not use the relay service* needs a call to be translated, that person must pay for that service.”³⁶

The Iowa UB is correct. Hearing people *who do not need to use the relay service* to communicate by telephone must pay – and should pay – for language translation. But we are not talking about hearing people in this proceeding. The ADA was designed to provide a means for eliminating telephone discrimination against deaf, not hearing people. The FCC has already ruled that deaf people who *do* need relay services *do* need language translation – ASL-to-English – to achieve functional equivalency. When one of the parties to a telephone call is deaf and the only way for that deaf person to communicate with millions of Spanish as well as English speaking people is through an interpreter who can translate one of these languages into ASL, then it is the FCC’s responsibility under the ADA to authorize services that can provide this translation for the deaf individual. To do otherwise is to severely restrict the number of Americans who deaf and hard of hearing ASL users may call in their native language. Imposing a restriction of this magnitude is tantamount to discrimination under the ADA.

III. The FCC Should Eliminate the Waiver for Answer Speed Sooner than January 2006.

In its June 2004 Report and Order, the FCC extended the answer speed waiver for VRS for an additional year and a half, until January of 2006. In support thereof, the

³⁶ Comments of Iowa UB at 3 (filed July 31, 2003) (emphasis added). In addition to its concern that a non-shared language ruling would have too broad a scope, this appeared to be the objection by the Missouri PSC as well, which noted that “no hearing caller can dial the number of a person who does not speak the same language as the caller, and have someone available, without charge, to translate the call.” Missouri PSC Comments at 3. But hearing callers are not the individuals for whom the ADA was created. It was created so that deaf people could communicate with hearing people, and as shown above, without ASL-to-Spanish translation, significant portions of the deaf population will not be able to use the telephone to communicate with Spanish speaking hearing people.

Commission cited to petitions requesting an extension of this waiver that were initially filed in September of 2003, and virtually disregarded the fact that two of the nation's leading VRS providers, hundreds of VRS consumers, and a significant number of deaf advocacy organizations across America have come forward since that time urging elimination of this waiver.³⁷ Moreover, the FCC did not even attempt to articulate an explanation for its declarations "that VRS will continue to benefit from an extension of the waiver of [the] speed of answer rule,"³⁸ and that "it is premature to require VRS providers to meet the speed of answer requirement (or to adopt a different speed of answer requirement for VRS)"³⁹ In failing to articulate a reason for its actions, the FCC has not only acted arbitrarily and capriciously in violation of the Administrative Procedures Act, but has also disregarded principles of law that allow the Commission to waive a provision of its rules only for "good cause shown" and in those instances where a party can meet the "heavy burden" of demonstrating that a waiver is in the public interest.⁴⁰ The overwhelming majority of commenters in this proceeding – both providers and consumers alike – have concluded that a continued waiver would *not* be in

³⁷ See CSD Ex Parte Amendment to Comments on Petitions for VRS Waivers (November 25, 2003); Hands On Amendment to Waiver Request (December 12, 2003). TDI has reported that consumers must wait as long as 30 minutes to make a phone call with some VRS provider services. Coupled with other new limitations, TDI describes the new level of VRS service as no longer providing functional equivalency; "it is disruptive, discriminatory and decreases rather than improves the quality of life of persons with hearing or speech disabilities." TDI Comments on the 2004-05 payment formula at 8 (May 24, 2004). As the FCC is aware, hundreds of consumers have similarly come forward to praise the benefits of VRS, and to ask the FCC not to take actions that will increase waiting times or otherwise diminish the quality of these services.

³⁸ June 2004 Report and Order at ¶121.

³⁹ *Id.* at ¶122

⁴⁰ FPC v. Texaco, Inc., 377 U.S. 33, 39 (1964); In order to grant a waiver, the Commission acknowledges that it must take a "hard look" at the waiver application, and then "explain why deviation better serves the public interest." June 2004 Report and Order at ¶110, citing Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971); WAIT Radio v. FCC, 418 F. 2d 1153, 1157 (D.C. Cir. 1969); Northeast Cellular Telephone Company, L.P. v. FCC, 897 F. 2d 1164, 1166 (D.C. Cir. 1990). The FCC has done neither here.

the public interest.⁴¹ These parties repeatedly have tried in vain to make the FCC understand that long waiting times violate the FCC's own obligation to enforce standards of functional equivalency.

There is no denying that initially, the answer speed waiver was justified. Institution of the waiver provided industry with much needed flexibility to meet growing VRS demand in a nascent market and provided incentives for new companies to enter the VRS business. With monthly VRS minutes now hovering at the one million mark, multiple VRS competitors, and advanced technologies regularly improving the quality of these services, however, the need for the answer speed waiver has long since expired.

In its very first rules on TRS issued in July of 1991, the Commission made clear that it would grant waivers of its minimum TRS standards only where it could be shown that those standards were technically infeasible.⁴² That the Commission has always held itself – as well as carriers – to this test was best shown in its handling of the coin sent-paid issue. When, in 1993, a number of common carriers petitioned the FCC to permanently suspend the mandate to make payphones relay accessible with coins, the FCC refused to grant their request, explaining that they had not met their burden of proving the infeasibility of providing this service: “Merely stating an incompatibility between TRS and [the Automated Coin Telephone System] without any analysis of alternative solutions does not meet the heavy burden carriers have to prove infeasibility

⁴¹ The only party – out of approximately one thousand parties – to come forward in support of a continued waiver is Sorenson Media, Inc. See Written Ex Parte Presentation of Sorenson Media, Inc. (June 24, 2004).

⁴² *In the Matter of Telecommunications Services for Individuals with Hearing and Speech Disabilities, and the Americans with Disabilities Act of 1990, Report and Order and Request for Comments*, CC Dkt. No 90-571, FCC 91-213 (1991) at ¶18 (noting that commenters agreed that “relay services should be capable of handling any type of call normally provided by carriers when technically feasible and that the burden be placed on the carriers to prove infeasibility.”). See 47 C.F.R. §64.604(a)(3).

of providing a service readily available to voice telephone users.”⁴³ In particular, the Commission was concerned that granting a waiver “without persuasive evidence of infeasibility would certainly impair and discourage the development of improved technology” in violation of the ADA.⁴⁴

In stark contrast, here not only has the Commission failed to require substantiation for an extension of the answer speed waiver, but in an unusual state of affairs, has some of the very providers who had initially requested this waiver urging its discontinuation! Nor can the Commission point to any technical obstacles to the answer speed standard, as demonstrated by the fact that CSD was already meeting this standard prior to the FCC’s first reduction in the VRS rate back in June of 2003.⁴⁵ Rather, on its own, and without any justification whatsoever, the FCC insists on continuing to allow VRS providers to determine their own call waiting times, despite the fact that doing so will continue to prevent deaf and hard of hearing consumers from receiving the functionally equivalent service promised to them under the ADA.

If the answer speed waiver is not supported by reasons of technical infeasibility, one can only speculate that its continuation is the result of FCC efforts to reduce VRS costs associated with the Interstate TRS Fund. The lack of supporting evidence for a waiver, coupled with the Commission’s own admission that it has an “interest in avoiding

⁴³ *In the Matter of Telecommunications Services for Individuals with Hearing and Speech Disabilities, and the Americans with Disabilities Act of 1990, Second Report and Order and Further Notice of Proposed Rulemaking*, CC Dkt. No 90-571, FCC 93-104 (1993) at ¶9.

⁴⁴ *Id.* at ¶10.

⁴⁵ In contrast to the answer speed waiver, all of the other VRS waivers – emergency call handling, operator assisted calls, long distance billing, equal access to interexchange carriers, and pay per call services are technical in nature. As prior submissions to the Commission have made clear, because VRS is primarily an IP service, compliance with these minimum standards is difficult, if not impossible for VRS providers at this time.

placing undue burdens on the Interstate TRS Fund,⁴⁶ inescapably leads to this conclusion. While it is understandable for the Commission to want to limit relay costs to those that are reasonable, imposing an undue burden criteria on expenses submitted to the TRS fund is neither appropriate nor authorized under the ADA. Unlike other titles of the ADA, Congress did not incorporate an undue burden standard into Title IV's mandate for relay services.⁴⁷ Rather, Congress's intent for telephone companies to provide functionally equivalent TRS was absolute; in an attempt to redress the financial hardships plagued by relay services of the 1970s and 1980s, Congress intentionally did not impose funding restrictions that could impede the provision of these services.

The ADA does not merely allow, but rather dictates the provision relay service that is functionally equivalent to conventional voice telephone services. It follows that the FCC, as the agency responsible for implementing TRS, cannot simply choose not to impose those minimum standards that are necessary to achieve functional equivalency. Rather, the FCC has an obligation, under the ADA, to develop rules that fulfill the Congressional mandate to provide a level and quality of relay services that parallel telephone services provided to the rest of the general public. It would be unheard of for hearing people to wait minutes for a dial tone before they could place a call. Because the FCC has already determined that minimal answer times are needed to achieve functional equivalency, and because there are no technical obstacles to providing a swift answer speed, the FCC has no legal basis for extending the answer speed waiver all the way until January 2006. In November of 2003, CSD requested the Commission to extend the

⁴⁶ June 2004 Report and Order at ¶190.

⁴⁷ Title I refers to undue hardship, rather than undue burden; however the factors that constitute both of these defenses are nearly identical.

answer speed waiver for a period of one year only.⁴⁸ CSD now renews this original request for the answer speed waiver to expire by January of 2005, with adequate compensation to support the services needed to meet that minimum standard.⁴⁹

IV. The FCC Should Permit Recovery of the Costs Associated with Researching and Developing Ways to Handle VRS Emergency Calls.

In its June 2004 Report and Order, the FCC decided to terminate its existing VRS waiver for emergency call handling by January of 2006.⁵⁰ CSD agrees that the ability to handle these types of calls will be critical to both the safety of the deaf community as well as the future viability of these services. Many relay users have begun to abandon use of their TTYs over the public switched telephone network, in favor of more advanced telecommunications services that include pagers, Internet relay and video relay services. It is imperative that the technology be in place to provide these individuals with an immediate connection to police, fire, and medical assistance to ensure prompt assistance in the event of an emergency.

As both a provider of VRS and a consumer based non-profit organization, CSD's interest in finding a solution for the emergency handling of VRS calls is paramount. But as the FCC has recognized, VRS providers "do not yet have the technology to automatically transfer emergency calls, with the caller's location information, to the

⁴⁸ CSD Ex Parte Amendment to Comments on Petitions for VRS Waivers.

⁴⁹ In the event that the FCC is unwilling to allow reasonable compensation to meet the existing minimum answer speed standard at this time, CSD will be proposing an alternative answer speed standard when it submits its comments in response to the FCC's FNPRM in this proceeding. This alternative approach would still implement an answer speed standard as of January 1, 2005, but make that a one minute standard, to be measured on a monthly basis. In addition, the alternative approach would continue waiving the answer speed mandate during the off-peak hours of 10:00 p.m. to 6:00 a.m. Eastern Standard Time, until January 1, 2006.

⁵⁰ June 2004 Report and Order at ¶118. This is the requirement for TRS providers to automatically and immediately transfer emergency calls to an appropriate public safety answering point. 47 C.F.R. §64.604(a)(4).

appropriate emergency service provider.”⁵¹ CSD estimates that it will need approximately eighteen months to research, develop, and roll out a solution that is both economically and technically feasible to handle VRS emergency calls in accordance with the FCC’s existing mandates for traditional TRS calls. Developing this solution will necessarily cause CSD (and other VRS providers) to incur expenses. What is troubling to CSD is that for now, the FCC has indicated that these expenses are not reimbursable:

We find that the Bureau was correct in disallowing engineering expenses directed at research and development, including software development, relating to VRS enhancements that go beyond the applicable TRS mandatory minimum standards. . . . Title IV is intended to ensure that entities that offer telephone voice transmission services *also* offer TRS so that persons with certain disabilities have access to the *functionality* of a voice telephone call. That functionality is defined by the applicable mandatory minimum standards, so that when a provider offers eligible services that meet these standards it may recover its costs of doing so from the Interstate TRS Fund.⁵²

Under the FCC’s present interpretation of the waived minimum standards, providers are not only not permitted to collect reimbursement for R&D costs that they incur now; they would also not even be permitted to submit these costs to NECA in January of 2005 when NECA gathers data submissions for the 2005-06 rate because only non-waived minimum standards can be used to justify any engineering costs. Instead, at the recent NECA meeting held on September 8, 2004, VRS providers were informally instructed to provide cost data for meeting the emergency handling standard in their April waiver reports. The problem with this is that it is not clear when or whether the FCC will determine the merits of those expenses. CSD fears that providers will be left with only a few months to research, develop, and implement the major software and hardware

⁵¹ June 2004 Report and Order at ¶118.

⁵² June 2004 Report and Order at ¶189 (emphasis in original text).

changes that are needed to meet the January 2006 deadline. This will require providers to meet the new mandate in a virtually impossible timeframe.

Because the FCC has decided to disallow all engineering expenses associated with research and development to meet presently-waived minimum standards, CSD and other providers are caught in a Catch 22: we must meet a standard by a date certain without any guarantee that we will be reimbursed for the expenses associated with efforts to meet that standard.⁵³ Again, the FCC appears to be motivated by its underlying interest in preventing the Interstate Fund from being overly burdened:

We believe that this conclusion best reconciles the Commission's interest in avoiding placing undue burdens on the Interstate TRS Fund with the statutory mandate that the Commission's regulations "do not discourage or impair the development of improved technology." Covered entities are encouraged to use and develop new technologies to meet these standards – *i.e.*, to provide the functionality mandated by the statute. But at the same time, we do not believe that the Interstate TRS Fund was intended to be a source of funding for the development of TRS services, features, and enhancements that, although perhaps desirable, are not necessary for the provision of functionally equivalent TRS service as an accommodation for persons with certain disabilities.⁵⁴

In a regulatory environment where many VRS providers, including CSD, face challenges operating at current levels of reimbursement, the FCC's rulings will not only create considerable hardship; they are patently unfair.⁵⁵ The FCC's decision to mandate emergency access without financial support for R&D activities needed to fulfill that mandate is also at odds with the agency's own annual reporting requirements. Every

⁵³ As noted in prior CSD pleadings, the FCC's approach also fails to take into account the very specific directive by Congress to promulgate rules that encourage the development of new relay technologies. The ADA requires the FCC to "ensure that regulations prescribed to implement [section 225 of the Act] encourage, consistent with Section 7(a) of this Act, the use of existing technology, and do not discourage or impair the development of improved technology." 47 U.S.C. §225(d)(2).

⁵⁴ June 2004 Report and Order at ¶190.

⁵⁵ During the last round of cost submissions, the final compensation rate adopted by the Commission was below CSD's allowable costs. This was because the rate was so weighted by the dominant VRS provider. In its comments on the FNPRM, CSD will be proposing an alternative means of determining the reimbursement rate in order to take into account the dominance of a single VRS provider.

April, VRS providers are directed to provide the Commission with details about “the progress made and steps taken to resolve the technological problems that prevent IP Relay and VRS providers from meeting these waived standards.”⁵⁶ Thus, while on the one hand, the FCC is telling providers to incur expenses designed to eliminate existing VRS waivers, on the other, it unfairly expects providers to absorb all of those expenses on their own.

The FCC has fallen into this quagmire because of its recent attempts to create two standards of functional equivalency, one for VRS and one for other relay services. As the FCC itself notes, the legislative history charged the Commission with defining functional equivalency through its mandatory minimum standards.⁵⁷ In 1991, the FCC fulfilled this mandate with comprehensive standards that have since been supplemented and modified in response to several advanced technologies that came along after these initial guidelines were promulgated. Congress intended for these minimum standards to apply to all types of TRS, to the extent they are technically feasible. It is precisely for this reason that the FCC has always required providers to submit reports on efforts to develop technical solutions for standards that are temporarily waived.⁵⁸ Until now, the message to providers has always been clear: even if a minimum standard is temporarily waived, providers

⁵⁶ June 2004 Report and Order at ¶¶ 111; 140.

⁵⁷ June 2004 Report and Order at ¶189 n.540, citing to various parts of the ADA’s legislative history indicating that the FCC’s mandatory minimum standards were to define functionally equivalent relay service.

⁵⁸ For example, in the past, TRS providers consistently had to submit progress reports to the Commission on their efforts to handle relay calls made with coins at payphones. Despite the fact that this standard was temporarily waived, the FCC repeatedly encouraged industry to undertake research and development to find a solution to handle these calls. This is because, although waived, the coin-sent paid requirement remained part of the FCC’s mandatory minimum standards. *See e.g., In the Matter of Telecommunications Services, and the Americans with Disabilities Act of 1990, Order*, CC Dkt 90-571, 93-1317, 8 FCC Rcd 8385 (adopted August 20, 1993, released November 29, 1993); *In the Matter of Telecommunications Services, and the Americans with Disabilities Act of 1990, Memorandum Opinion and Order*, CC Dkt 90-571, DA 95-1874, 10 FC Rcd 12775 (August 25, 1995).

should be doing whatever they can to meet that standard, under the assumption that the waiver will one day be eliminated.

As the agency charged with ensuring functionally equivalent service to relay consumers, the FCC should be doing what it can to support, rather than hinder provider efforts to meet temporarily waived standards. The FCC may try to assert that it is doing just that by eliminating the emergency call handling waiver. But without compensation for the research and development needed to find an emergency access solution, providers who undertake efforts to fulfill this mandate may find themselves saddled with heavy costs that are not reimbursable by the Interstate Fund. In order to remedy this situation, CSD hereby requests that the FCC immediately allow reimbursement of engineering and other expenses associated with finding a solution that will enable VRS providers to automatically transfer emergency calls to appropriate public safety answering points, so that they will be able to meet the FCC's January 1, 2006 deadline.

V. Conclusion

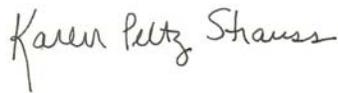
For the above reasons, CSD asks the Commission to (1) authorize compensation from the Interstate TRS Fund for video relay conversations between ASL users and individuals who speak Spanish; (2) eliminate the answer speed waiver for VRS providers by January 1, 2005 and provide adequate compensation to support that standard; and (3) permit VRS providers to immediately recover costs associated with the research and

development of solutions for handling emergency calls.

Respectfully submitted,

/s/

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